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IN THE

Supreme Court of the United States

October Term, 1953

No. 511

ELWOOD C. MARTIN, FRED A. NEMEC and ROBERT W. NEMEC, a co-partnership doing business as NEMEC COMBUSTION ENGINEERS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a co-partnership doing business as Nemec Combustion Engineers, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit, rendered on October 19, 1953, which ordered entry of a decree enforcing an order of the National Labor Relations Board.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C., Sec. 1254 (1) and the Act of June 7, 1934, C-246, 48 Stat. 926; July 5, 1935, C-372, 10, 49 Stat. 453, as amended June 23, 1947, C-120, Title 1, Sec. 101, 61 Stat. 146; June 25, 1948, C-648, Sec. 32, 62 Stat. 991; 29 U. S. C., Sec. 160(e).

The Opinion of the Court of Appeals for the Ninth Circuit was filed October 19, 1953. An order was made by that Court staying the mandate until December 28, 1953, pending the filing of this Petition for Certiorari.

Opinion Below.

The opinion of the Court of Appeals is not yet reported but is printed in the record [R. 238].

Questions Presented.

The questions presented by this petition are:

1. Whether the National Labor Relations Act as amended by the Labor Management Act (61 Stat. 136, 29 U. S. C., Sec. 160(b)) empowers the National Labor Relations Board to issue a complaint more than six months after the alleged commission of certain unfair labor practices to wit: alleging the discharge of two named employees for engaging in "concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection" when the original charge filed within the six months period alleged the commission of a different unfair labor practice, to wit, the discharge of the same two employees for "engaging

in union organizational activities for the purpose of discouraging the formation of the union." The said Section 10(b) of the Act providing "that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

2. Whether there was substantial evidence to support the following findings of the Board:

(a) That an employee was discharged for engaging in "concerted activities" when the undisputed evidence disclosed that the employee stated that he was quitting his job and the employer believed he was.

(b) That an employee was discharged for engaging in "concerted activities" when the evidence disclosed that he was guilty of inefficiency and insubordination but he was also secretly, and without the knowledge of the employer, engaged in union organizational activities.

3. Whether when a charge of unfair labor practice against an employer is dismissed at the conclusion of the evidence in chief of the general counsel for insufficient evidence it is error depriving the employer of a fair trial to fail to make findings in favor of the employer on the dismissed charge and to thereafter draw adverse inferences and conclusions based upon the evidence introduced to support the dismissed charge.

Statute Involved.

Pertinent provisions of the National Labor Relations Act as amended by the Labor Management Act (61 Stat. 136, 29 U. S. C. Supp., Sec. 151 *et seq.*) are set forth in the appendix.

Statement.

On February 1, 1951, a charge was filed with the Board against petitioners by a Union alleging that petitioners had engaged in unfair labor practices affecting commerce in that petitioner discharged two employees on December 28, 1950 "upon the grounds that these employees were engaging in union organizational activities for the purpose of discouraging the formation of the Union" [R. 1-2].

On November 14, 1951, which was more than six months after the occurrence of the alleged unfair labor practices, a complaint was issued by the Board alleging that petitioners committed unfair labor practices in that they discharged employee Thomas Frederick on December 27, 1950, and employee Clarence Leeper on December 28, 1950, "for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection" [R. 5-6], and that about January 21, 1950, petitioners interfered with, restrained, and coerced its employees in the exercise of certain rights guaranteed in Section 7 of the Act by attempting to influence them against the Union [R. 6, par. 6]. A representative consent election had been held January 23, 1951 [R. 2], at which the employees voted against union representation.

A hearing was held before the Examiner and at the end of the evidence in chief of the general counsel he dismissed for insufficient evidence, the charge contained in

paragraph 6 of the Complaint involving an alleged violation of Section 8(1) of the Act [R. 137-140] which charged an attempt to influence employees against the Union. The Examiner found that the employee Thomas Frederick had not been discharged for cause but had been discharged because of his activity in behalf of the Union and because he sought to secure the support of other employees in concerted activities [R. 23-24], and that petitioner had discharged employee Leeper and that Leeper had not voluntarily quit his job [R. 18-20]. The Examiner recommended, and the Board adopted the recommendations, that Frederick be offered reinstatement with pay and that the Estate of Leeper (who had died) be compensated for any monetary loss. It recommended the posting of a notice containing this offer of reemployment to Frederick and a statement that petitioner would not discourage concerted activities on the part of the employees or membership in the Union and that the employees were free to form a labor organization or to join or assist the particular Union.

Before the Board, and before the Court of Appeals, petitioners asserted that the findings and recommendations and the proposed order should not be enforced for the reasons:

(1) That the Board was without power to issue the Complaint more than six months after the alleged commission of the alleged unfair labor practices by virtue of the provisions of Section 10(b) of the Act and that al-

though the original charge was filed within the six months' period it alleged that the employees were discharged for engaging in "union organization activities for the purpose of discouraging the formation of a" particular union, while the complaint filed after the six months' period contained a new and different charge of unfair labor practice, to wit, that the employees were discharged "for engaging in concerted activities for the purpose of collective bargaining";

(2) That employee Leeper had quit his job and not been discharged;

(3) That the employee Frederick had been discharged for cause and not for union organizational activities or concerted activities known to the petitioners;

(4) That the Board should have made findings in favor of petitioners upon the charge which was dismissed for insufficient evidence but instead of so doing it drew adverse inferences and conclusions which were predicated solely on the evidence introduced to support the dismissed charge.

The Court of Appeals ruled against petitioners and ordered enforcement of the Board's order.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

The Decision Is in Direct Conflict With the Decision of the Court of Appeals for the Fourth Circuit on the Same Matter and Is Contrary to the Provisions of the Act.

As stated above, the original charge filed within six months from the date of the discharge of the employees, alleged that they were discharged "for engaging in union organizational activities for the purpose of discouraging the formation of the Union." More than six months after the date of discharge, the complaint was issued. The complaint did not charge that the employees were discharged for engaging in union organizational activities for the purpose of discouraging the formation of the Union or for any other activities related to the Union. On the contrary, it is alleged that the employees were discharged more than six months prior to the issuance of the Complaint for engaging in "concerted activitiec with other employees for the purposes of collective bargaining and other mutual aid and protection" [R. 5-6].

The Court of Appeals for the Fourth Circuit, in the case of *Joanna Cotton Mills Co. v. N.L.R.B.*, 176 F. 2d 749, on an identical fact situation, held that where a charge was filed within the six months period alleging discharge of employees *for engaging in Union activities* and a Complaint was issued more than six months after the commission of the alleged acts charging that the em-

ployer engaged in unfair labor practices by discharging employees for engaging in *"concerted activities,"* that the proceedings were barred by the Statute of Limitations, Section 10(b) of the Labor Management Relations Act, 29 U. S. C., Section 160(b), which provides that "no complaint shall issue based upon an unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The Court held that the complaint was a substitute for the original complaint and that it introduced a new and entirely different charge of unfair labor practice from that contained in the original charge.

The decision of the court below is directly contrary to this decision of the Court of Appeals for the Fourth Circuit.

In *Gaynor News Co. v. N.L.R.B.*, (2 Cir.), 197 F. 2d 719, certiorari granted and cause argued November 1953, October 1953, No. 7, the Court of Appeals held that when a charge was filed within the six months period alleging discrimination against one nonunion employee an amended charge could be filed after the six months period *alleging the same discriminatory practice* against additional nonunion employees. The basis of the decision was that the amended charge "related back" or defined "more precisely" the *charges enumerated* within the original and timely charge.

Section 10(b) of the Act, 28 U. S. C., Section 160(b), expressly provides that the Board "shall have power to issue and cause to be served" a "complaint stating" *the respects* in which any person has engaged in an unfair labor practice "provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof." The decision of the court below is contrary to this provision of the statute. The statute empowers the Board to issue a complaint only within the six months' period and such complaint may be issued only "whenever it is charged that any person has engaged in or is engaging *in any such unfair labor practice,* the Board . . . shall have power to issue . . . a complaint *stating the charges in that respect.*" The Statute contemplates that the original charge shall specify the respects in which the conduct constitutes an unfair labor practice. The complaint can only be issued after the expiration of the six months' period if it contains the same charges, that is, the same respects in which the conduct constitutes an unfair labor practice.

II.

This Case Raises Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

The Labor Management Relations Act applies nationwide. The statute of limitations rule should be the same in all circuits. One rule should not apply in one circuit and another rule in another cricuit. Labor, Management, the Board and the Courts in all circuits should know whether the filing of an original charge with the Board within six months of the alleged commission of a particular unfair labor practice, is or is not sufficient to confer power on the Board to issue a complaint more than six months later and even years later, specifying the commission of a new and different charge of unfair labor practice from that specified in the original complaint.

Under the decision sought to be reviewed the six months' statute of limitations is in effect a nullity so long as the original charge contains an allegation of the commission of any unfair labor practice. Under this ruling the Board may at any time thereafter issue a complaint which abandons the original charge and introduces a new and entirely different unfair labor practice. This does violence to the congressional intent manifested by the language of the statute which limits the power of the Board to issue a complaint within six months from the date of the alleged commission of the unfair practice complained of.

Under the original National Labor Relations Act, Section 10(e), (f), it was only required that the findings be supported by evidence. This Court, in *Consolidated Edison Company v. N.L.R.B.*, 305 U. S. 197, held that this

meant substantial evidence. The 1947 amendments to the act now require that the findings of the Board shall be conclusive only "if supported by substantial evidence on the record considered as a whole (§10(e))." Section 10(c) requires that there must be a "preponderance of the testimony" to justify a finding of commission of an unfair labor practice. This places a greater responsibility on the reviewing Courts.

In the instant case, although the Board found that employee Leeper had been discharged for engaging in concerted activities, the undisputed evidence is that Leeper demanded that he be paid for the lunch hour period and an additional bonus for the night shift, and that if he was not paid he would quit [R. 144-146, 152-154, 161, 179, 180, 190]. Petitioners declined to agree to Leeper's demands, treated his offer as one that he was quitting, and gave him his termination pay. The undisputed evidence is that Leeper was not engaged in union activities and was opposed to unions.

As to employee Frederick, the evidence is that he was laid off twice for sloppy work, that shortly before Christmas the foreman wished to discharge him for having disobeyed orders, but petitioners determined to keep him on until after Christmas, that he thereafter disobeyed orders and was discharged, Frederick was admittedly engaged in union organizational activities but the record is devoid of evidence that petitioners had any knowledge thereof. The first knowledge by petitioners that Frederick was a union organizer was acquired several weeks after his discharge.

Since the complaint did not allege that petitioners engaged in any unfair labor practices with respect to the

union involved and the only charge in the complaint with respect to the union was dismissed for insufficient evidence, the making of an order requiring the posting of a notice that the employees were free to join that particular union was unwarranted.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Ninth Circuit sitting at San Francisco, California, commanding that Court to certify and to send to this Court on a day certain to be named therein, a full and complete transcript of the record and all proceedings had in this case, numbered and entitled on its docket No. 13690, to the end that this case may be reviewed and determined by this Court; that the said decree of the United States Court of Appeals for the Ninth Circuit may be reversed by this Court; and that your petitioners may have such other and further relief in the premises as may seem just and proper.

Respectfully submitted,

ELWOOD C. MARTIN,
FRED A. NEMEC,
A Co-Partnership Doing Business as
Nemec Combustion Engineers,
Petitioners.

R. D. SWEENEY,
J. E. SIMPSON,
Attorneys for Petitioners.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

The Decision Below Is in Direct Conflict With the Decision of the Court of Appeals for the Fourth Circuit on the Identical Point.

As stated above, Section 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. This means that the complaint must allege the same unfair labor practice as was alleged in the original charge if the complaint is issued more than six months after the commission of the practice. The statute does not contemplate that a charge may be filed alleging any unfair labor practice and the

running of the statute of limitations thereby stopped as to other unfair labor practices.

In *Joanna Cotton Mills Co. v. N.L.R.B.* (4 Cir.), 176 F. 2d 749, the identical question was presented as that here involved. In that case the original charge alleged that certain employees were discharged for engaging in "union activities." More than six months later an amended charge was filed alleging that the employees were discharged for engaging in "concerted activities." The Court of Appeals held that the amended charge was expressly filed as a substitute for the original charge, that it introduced a new and entirely different charge of unfair labor practice in that the original charge referred to a discharge of employees for engaging in "union activities" and not for engaging in "concerted activities" while the amended charge referred to "concerted activities" and not to "union activities."

The decision below refers to the *Joanna Mills* case but refused to follow it.

These are the only courts of appeal that have decided this identical point.

The *Gaynor News Co.* case (2 Cir.), 197 F. 2d 719, now pending before this court, held that it was proper to enlarge upon the original charge by an amended charge naming additional employees as having been the subject of the *same discriminatory practice,* that is, failure to pay benefits to the nonunion employees which were paid to union employees. Although the statute of limitations is involved in the *Gaynor* case, the identical question as to whether the amended charge alleged a new and different unfair labor practice is not directly involved.

The courts of other circuits have also held that the original charge may be enlarged upon to include other factors or other employees subjected to the same unfair labor practice, but those cases did not involve a new and different unfair labor practice.

Section 7 of the Act confers different rights upon employees classified as follows: (1) to self organization, (2) to form, join or assist labor organizations, (3) to bargain collectively through representatives of their own choosing, (4) to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and (5) to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

The original charge filed by the union was that two named employees were discharged for engaging in union organizational activities with respect to a named union. The complaint issued more than six months after the alleged happenings entirely abandoned all references to a discharge for union activities and substituted a charge that the employees were discharged for engaging in "concerted activities."

These are different rights conferred upon employees and require different evidence. The elements of the two are not the same. The discharge for engaging in union activities of necessity requires proof respecting a union. Only one employee may be involved. Engaging in concerted activities does not require that any union be involved and it requires concert of action by two or more employees. If the two rights are the same then one of them is surplusage.

Since the Labor Relations Management Act is nationwide in operation, the conflict between the fourth and ninth circuits should be settled.

Petitioners contend that the ruling of the Fourth Circuit is correct and in accordance with the language of the statute, but that the decision below is not.

As illustrative of the point the evidence in the record discloses that the employee Thomas Frederick was engaged in attempting to have employees sign union authorization cards but that his activities were not known to petitioners. Employee Leeper, on the other hand, was opposed to unions and was not engaged in any union activities. But the Board held, and the court agreed, that Frederick was engaged in concerted activities when the evidence disclosed that his only activities related to a union, and the petitioners were not charged in the complaint with having discharged him for engaging in union activities.

The effect of the decision below would be to permit the filing of a general omnibus charge that an employer committed any unfair labor practice and after the lapse of the six months period of limitation to substitute a charge of an entirely different and new unfair labor practice.

This does violence to the language of Section 10, which provides that it may be charged that any person has engaged in or is engaging in "any such unfair labor practice" that the Board may issue a complaint "stating the charges in that respect." This language would appear to mean that the power of the Board is limited to issuing a complaint containing the charge of the same unfair labor practice complained of in the original charge.

II.

The Findings of the Board Are Not Supported by Substantial Evidence Proving the Unfair Labor Practices Alleged in the Complaint.

As stated above, a charge of unfair labor practice must be established by a preponderance of substantial evidence.

In the instant case the evidence is undisputed that employee Leeper, in the presence of about fifteen other employees, demanded that he be paid for the lunch hour period and a night shift bonus, and that if his demands were not met he was quitting [R. 144-146, 152-154, 161, 179, 180, 190]. Petitioners believed that Leeper was quiting unless they met his demands and gave him his termination check. Leeper was not engaged in union activities but was opposed to them [R. 72, 166-167]. Other employees who were present stated that Leeper was speaking for himself alone [R. 153] and one employee demanded and received his termination check [R. 60-61, 71].

Leeper had the right to quit or offer to quit and the employer had the right to accept his offer to quit. This undisputed evidence utterly fails to establish the original charge that Leeper was discharged for engaging in union organizational activities, and at the most it established only that the employers, in good faith, believed that Leeper was quitting if they did not meet his demands. The evidence fails to establish a discharge for engaging in concerted activities.

The other employee, Thomas Frederick, was engaged in union organizational activities but he was also a sloppy workman. The foreman had requested permission to discharge him for inefficiency and disobedience of orders,

but the employer decided not to do so until after the Christmas holidays. The first knowledge that petitioners had that Frederick was engaged in union activities was after he was discharged [R. 201-202, 159]. In the absence of knowledge of his union activities it is manifest that those activities could not have been the reason for his discharge. He admitted that he engaged in these activities on the sly [R. 119].

Petitioners contend Frederick was discharged for just cause.

It is submitted that even though the evidence established that petitioners knew that Frederick was engaged in union activities, that this does not constitute substantial evidence that he was discharged for engaging in concerted activities with other employees.

It is respectfully submitted that a writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed.

R. D. SWEENEY,

J. E. SIMPSON,

Counsel for Petitioners.